No. 13880

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARIE BALLENTINE, as Guardian of the Estate of Stephen William Ballentine,

Appellant,

vs.

MARIE DESYLVA,

Appellee.

MARIE DESYLVA,

Appellant,

vs.

MARIE BALLENTINE, as Guardian of the Estate of Stephen William Ballentine,

Appellee.

APPELLANT'S REPLY BRIEF.

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ARGUMENT.

I.

Where an Author Leaves Surviving a Widow and Child, the Copyright Act Permits Both to Participate as a Class in the Renewals of Copyrights Accruing After the Death of the Author.

The pertinent portions of Title 17, U. S. C., Section 24, providing for the renewal of copyrights, reads as follows:

"DURATION; RENEWAL AND EXTENSION.

"The copyright secured by this title shall endure for twenty-eight years from the date of first publi-

cation, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name. . . . *And provided further,* That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, *or the widow, widower, or children of the author, if the author be not living,* or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright. . . ." (Second emphasis ours.)

The language used in the aforesaid statute clearly indicates the intention of Congress that the widow or widower of an author is not to have priority on renewals of copyrights to the exclusion of the children of an author. A consideration of the objects and policy of said statute, as well as of equity and conscience, affirm such intention. Further, such intention is clearly and unequivocally demonstrated in said statute by unmistakably indicating the priority of each particular group or *class* entitled to the renewal privilege by the use of a qualifying phrase inserted between each group or *class. No such qualifying phrase is used or found in the act within the group or class of widow, widower, or children of the author.*

Thus, the aforesaid Act first gives the right of renewal to the author of such work, *if still living,* then to the widow, widower, or children of the author, by the qualify-

ing phrase *"if the author be not living,"* then to the author's executors, or in the absence of a will, his next of kin, by the qualifying phrase *"if such author, widow, widower, or children be not living."*

II.

The Word "or" in the Phrase "Widow, Widower, or Children of the Author Is Used in the Conjunctive Sense in the Copyright Act, and Any Other Construction Would Render Said Provision Repugnant to the Other Provisions of Said Statute and Be Contrary to the Intention of Congress.

Appellee claims that the words "widow, widower, or children of the author" were used in the Copyright Act in the disjunctive sense. It is respectfully submitted that such a contention is untenable and that such a construction would render the provision in question repugnant to the other provisions of the statute and be contrary to the intentions of Congress.

The intention of the Congress is to be sought for primarily in the language used and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture.

> *Thompson v. United States*, 246 U. S. 547, 551, 38 S. Ct. 349, 351, 62 L. Ed. 876.

The appellee would like to have the aforementioned portion of the Copyright Act interpreted as though it read substantially as follows:

> "That . . . the author of such work, if still living, or the widow or widower of the author, if the author be not living, or if such author, widow or

> widower be not living, the children of the author, or if such author, widow, widower, or children be not living, then the author's executors. . . ."

The difference between the Copyright Act as it actually reads, and the way the Appellee would like to have it construed as reading, is so obvious as to require no further elaboration thereon.

The cases cited by Appellee on pages 4 and 5 of her brief do not support her contention that the words "widow, widower, or children of the author" are used in the Copyright Act in the disjunctive sense. A reading of said cases clearly indicates that any other construction of the acts or matters therein involved would have been repugnant to the other portions thereof or to the obvious intent of the persons or matters involved in said cases. For example, in the case of *In re Rice* (U. S. C. A., D. C., 1947), 165 F. 2d 617, 619, cited by Appellee on page 4 of her brief, the term "common carrier" was used in the statute therein involved to include every person owning, operating, controlling, *or* managing any agency or agencies for public use for the conveyance of persons or property within the District of Columbia for hire. The question there was whether a person coming within only one of said categories was covered by the Act. Obviously, if the term "common carrier" as used in said statute was interpreted to mean only those who were in *all* of the categories therein named, such a construction would have been repugnant to the other portions of the Act or to the obvious intent of Congress that the aforesaid term was used in the disjunctive sense.

Again, in *Travers v. Reinhardt,* 205 U. S. 423, 430, 51 L. Ed. 865, 869, cited by Appellee on pages 4 and 5

of her brief, the Court was called upon to construe a provision in a will "that if any of my sons should die *without leaving a wife or child or children at his death.*" The court was asked, by interpretation, to substitute the word "and" in place of "or" in the aforesaid phrase. The court said that looking at all of the provisions of the will, and ascertaining, as best it may, the intention of the testator, it perceived no reason for interpreting the words used by him otherwise than according to their ordinary natural meaning. It was clear in said case that the testator's intent was to use the aforesaid provision in the disjunctive sense. The Supreme Court in said case, speaking through Mr. Justice Harlan, merely affirmed a decree from the Court of Appeals, which had affirmed a decree of the Supreme Court of the District, which had confirmed a report of the auditor in a suit for partition. No interpretation of an Act of Congress was therein involved.

In *Gay Union Co. v. Wallace,* 71 App. D. C. 382, 387, 112 F. 2d 192, 197, cited by Appellee on page 4 of her brief, the Secretary of Agriculture was directed under an Act of Congress to make allotments of the sugar quota in a variety of circumstances. Several standards were to be taken into consideration by the Secretary of Agriculture. The Court there pointed out that since each of the factors stated in the Act were complete in itself, the word "or" merited its normal disjunctive meaning. It is respectfully submitted that in said case the obvious intent of Congress with respect to the use of the word "or" was in the disjunctive sense in that any one of the standards would suffice.

The case of *International Mercantile Marine Co. v. Lowe* (2d Cir. 1938), 93 F. 2d 663, 665, cited by Appellee on page 5 of her brief, is clearly against Appellee's posi-

tion. Although in said case the Court said that as used in the Longshoremen's Act, limiting total compensation for *injury or death,* the word "or" is a disjunctive particle signifying an alternative and that hence the Act limits *separately* the maximum compensation for disability and the maximum for death, two separate claims, one for compensation and one for death were approved because of the use of the word "or" and *thereby in effect giving said Act a disjunctive construction in Section 14(m) and a conjunctive construction* by *holding* that the Act allowed *both* maximums despite the use of the word "or" in the statute.

Likewise, in *In re 188 Randolph Building Corp.* (7th Cir., 1945), 151 F. 2d 357, 358, cited by Appellee on page 5 of her brief, the use of the word "or" in the Bankruptcy Act there in question was clearly intended by Congress to be construed in the disjunctive sense.

Appellee has cited the case of *Adolfson v. United States* (9th Cir., 1947), 159 F. 2d 883, 886, on page 5 of her brief. There the word "or" was used in a Criminal Statute and it clearly appears from the provisions of said Statute that the word "or" was used therein in the disjunctive sense, it covering therein several specifically named offenses.

In the instant case we have just the opposite situation. Here the intention of Congress that the word "or" in the phrase "widow, widower, or children of the author" was used in the conjunctive sense in the Copyright Act clearly appears from a reading of said Act.

Said intention of Congress becomes demonstrably clear when there is taken into consideration an earlier draft of said statute which read as follows:

> "That the copyright . . . may be further renewed and extended by the author, if he be still living, or if he be dead, leaving a widow, by his widow, or in her default or if no widow survive him, by his children. . . ."[1]

Appellee has based her contention that the widow or widower takes precedence over the children on the argument that the language referring to the group of "widow, widower, or children" employs the coordinating particle "or" and that such word is used in the disjunctive, meaning an alternative. In this connection we note, first, that "or" used as an alternative does not denote a priority unless we modify the language employed by reading into it some qualifying phrase such as "or if no widow or widower survive, then the children. . . ."[2] To do so would, of course, modify the language used in the statute by construction.

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[1]Section 19, H. R. 19853 and S. 6330, 59th Congress, First Session, entitled "A Bill to Amend and Coordinate the Acts Respecting Copyright."

[2]Webster's New International Dictionary, Second Edition, Unabridged, defines "or" as: "a coordinating particle that marks an alternative; as you may read or may write . . . it often connects a series of words or propositions presenting a choice of either; as he may study law *or* medicine *or* he may go into trade." Disregarding our feelings of what he should study, it is clear that the word "or" by itself indicates a choice and nothing more—it does not indicate which choice is preferable until language is added or read into the sentence to indicate that.

Secondly, it is well established that the *conjunctive and disjunctive* are signified by the use of the word "or" if to do so is consistent with the legislative intent.[3]

It is respectfully submitted that although in the cases cited by Appellee on pages 4 and 5 of her brief, the word "or" was construed in the disjunctive sense, said construction merely required the presence of only one of the alternative situations therein involved, and such construction did not in any manner result in the exclusion of or the taking of precedence over any of the other situations. So here, too, *either* the widow *or* the child of the author could apply for a renewal of a copyright, and whichever one obtained said renewal would hold the same in trust for the benefit of both, they *both being in the same class of entitlement.* Where one of a *class* entitled to a renewal of copyright obtains the renewal for himself, he holds the same in trust for the benefit of the entire class.[4]

Certainly the construction of the Copyright Act by those charged with the duty of executing said Statute is entitled to persuasive weight and ought not to be disregarded or ignored without cogent reasons. That agency in the instant case is the Copyright Office. As set forth in Appellant's Opening Brief, on pages 9 and 10, the Copyright Office has taken the position that the order of

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[3]*Union Starch and Refining Company v. N. L. R. B.* (7th Cir., 1951), 186 F. 2d 1008, 1014, *cert. den.* 342 U. S. 815, 72 S. Ct. 30, 96 L. Ed. 617, and cases therein cited; *Tyson v. Burton* (1930), 110 Cal. App. 428, 294 Pac. 750, 752.

[4]*Tobani v. Carl Fischer, Inc.* (2nd Cir., 1938), 98 F. 2d 57, *cert. den.* 305 U. S. 650, 59 S. Ct. 243, 83 L. Ed. 420; *Silverman v. Sunrise Pictures Corp., supra.* See also *Edward B. Marks Music Corp. v. Jerry Vogel Music Co., Inc.* (2nd Cir., 1944), 140 F. 2d 266, 267; *Edward B. Marks Music Corp. v. Wonnell* (Dist. Ct., S. D. N. Y., 1945), 61 Fed. Supp. 722.

enumeration specified in the Statute is *by classes* and that the children and widow or widower are to be taken as a *single class* for renewal purposes; further, that the widow or widower does not take precedence over the children in asserting renewal claims; and that the benefits of the renewal are held as tenants in common so that if one of the class renews, he does it for the benefit of all.

Appellee has made reference to 13 C. J. page 1090, on page 7 of her brief. The footnote to said reference includes for its authority the Rules and Regulations for Registration of Claims to Copyright (Copyright Office Bul. No. 15), Rule 48. In that connection the Court's attention is respectfully invited to Appellant's references on pages 9, 10 and 11 of his Opening Brief to the excerpt from Circular No. 15 of the Copyright Office entitled "Instructions for Securing Registration of Claims to Renewal Copyright," and to the position set forth by George D. Cary, Principal Legal Advisor to Copyright Office, in letters sent to counsel for both parties herein.

It is respectfully submitted that the references on page 7 of Appellee's Brief, wherein they recite "in the order stated" or "in the order named," means *in the order of each class named or stated.*

Appellee has cited 34 *Am. Jur.* page 423, on pages 7 and 8 of her brief, which reads as follows:

> "The author of such work, if living, is entitled to the extension. If he is not living, the right exists in the author's widow, widower, or children if there is such, otherwise the extension may be secured by the author's executors, or, in the absence of a will, to his next of kin. In any case, however, an application for such renewal and extension must be made to the copyright office and duly registered therein, within

> one year prior to the expiration of the original term of the copyright. The purpose of the renewal provision in the copyright statute is to give to the persons enumerated in the order of enumeration a new right or estate not growing legally out of the original copyright property, but a new creation for the benefit, if the author is dead, of those naturally dependent upon, or properly expectant of, the author's bounty."

It clearly appears from a reading of the foregoing that the order of enumeration is in the sequence of *classes,* with the author's widow, widower, or children being in one single class *without any priority on renewals of copyrights in favor of one to the exclusion of the other.*

Appellee appears to rely heavily upon the case of *White-Smith Publishing Co. v. Goff* (1st Cir., 1911), 187 Fed. 247. Appellee refers to a certain inference that the person who takes on the death of the author is the widow. In said case there was no dispute between a widow and child of an author with respect to renewal rights of a copyright. Said action merely involved a claim by a publisher for a statutory extension and the Court limited the extension rights only to the classes enumerated. In fact, there is no indication that there were any children surviving the author, and any reference to widow in said decision would be mere dicta. Furthermore, where the Court in said case said, at page 250, that "this did in truth assume to vest the new right in the widow, *etc.* (emphasis ours) if the author was not living * * *," it was undoubtedly, by the use of the word "'etc.," including widow and children as a class.

Appellee has quoted, on pages 9 and 10 of her brief, from an opinion handed down by Assistant Attorney General Fowler. Said opinion was written in reply to an

inquiry concerning renewal of copyright by an assignee of the author. It is respectfully submitted that a reading of the language quoted from said opinion clearly shows a break-down by *classes,* with the widow and children being treated as *one class.*

Appellee has cited the case of *Silverman v. Sunrise Pictures Corp.* (2d Cir., 1921), 273 Fed. 909, on page 10 of her brief, as dealing with the question here involved. In said case, however, the author left no husband, children, or descendants of children surviving. Said case, therefore, did not involve any question of renewal rights of a widow or children. Said opinion did point out, however, that the renewal right is a new creation for the benefit (if the author be dead) of *those naturally dependent upon or properly expectant of the author's bounty.* There is nothing in said opinion which would indicate that if the widower and children had survived the author they would not have been treated as a class. The use of the words "in the order of their enumeration" meant treating each designated group as a class.

Appellee has cited certain portions of works on pages 12, 13 and 14 of her brief. It is respectfully submitted that the aforesaid portions of the works cited by Appellee either show an intent to regard a widow and children as being in one class with respect to renewal rights of copyrights, or do not deal with the specific question herein involved, or do not follow the wording of the act, or are unsupported by any authority for the position taken by Appellee that the surviving widow takes to the exclusion of the surviving child. As previously pointed out, the act in question *does not read* as claimed in some of the aforesaid works that if an author is dead the renewal may be made by his widow and that if there is no widow, by

his child. Neither does the act indicate in any manner whatsoever that an author's children cannot renew the term if the author's widow be living. While the act designates various groups entitled to renewal privileges, and contains qualifying phrases inserted between said groups, no such qualifying phrase is found within the group or class of "widow, widower, or children." This clearly indicates that no priority within the said group was ever intended by Congress. In fact, it would be repugnant to the other provisions of the statute and contrary to the intent of Congress if the surviving widow and child were not grouped together as a class.

Appellee has argued that certain problems would arise if it were assumed that the widow and children take as a class, and give as an example the problem of how the child or children would share with the surviving widow. It is respectfully submitted that said argument is not well taken. The examples given by Appellee do not present any insurmountable obstacles. Such situations have obviously obtained in innumerable instances wherein various intestate succession statutes have been involved. Be that as it may, in the instant case the author left surviving a widow and only one child, and there is no problem with respect to the share of each in the copyright renewals.

Appellee has urged that Appellant was not entitled to an accounting. It is respectfully submitted that Appellant's right to an accounting is a proper issue in this appeal, since the Appellant is equally entitled with Appellee to the right of renewals of the copyrights in issue. It

follows therefrom that where Appellee, as *one of a class* entitled to renewals of copyrights, obtain renewals for herself, and has been unjustly enriched to the extent of Appellant's rights and interest therein and share thereof, she holds the same in trust for the benefit of the *entire class, which includes Appellant.* As such a constructive trustee Appellee is obligated to and should account to Appellant.

Conclusion.

It is respectfully submitted that the language of the renewal section of the Copyright Act clearly spells out the intention of Congress to treat the surviving widow, widower, or children as a *class,* entitled to participate in renewals of copyrights, without any precedence of one over the other. Said intention becomes more apparent when the language used is viewed in the light of the policy and purposes of the renewal portion of the Copyright Act, which was for the benefit of those naturally dependent upon or properly expectant of the author's bounty. It cannot be said that a child, particularly one of tender years as is the Appellant, is less dependent upon or properly expectant of the author's bounty than is a widow. In view thereof neither is entitled to precedence over the other. Giving preference to the widow or widower would unjustly deprive the children of their rightful share in these copyrights.

For the reasons mentioned, it is respectfully submitted that the portion of the judgment of the Trial Court herein appealed from by Appellant should, therefore, be reversed,

and that it should be declared that so long as both Appellant and Appellee are alive, the widow and child are equally entitled to renew and share in copyrights originally obtained by George G. DeSylva, and that Appellee should account to Appellant with respect to those renewals already obtained by Appellee since the death of George G. DeSylva.

Respectfully submitted,

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